Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

DAVID TEX HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the defendant in a prosecution for a specific intent crime has a fundamental constitutional right to present a complete defense as to the mental element of that crime?

B. Whether the district court has the discretion to enter a Preliminary Order of Forfeiture allowing the defendant to substitute cash for real and personal property?

C. Whether the district court has the discretion to stay the execution of the criminal forfeiture judgment, as it is well within the district court's discretion to consider prejudice to the defendant and the difficulties of execution of forfeiture while an appeal is pending?

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Petitioner David Tex Hill respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *United States v. Hill*, 167 F.3d 1055 (6th Cir. 1999). (App. A). The opinion of the district court in *United States v. Hill*, No. 3-95-00024 (M.D. Tenn. 1997) is not reported. (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on February 17, 1999. The Court of Appeals denied a timely petition for rehearing and for rehearing *en banc* April 15, 1999. (App. C). This petition for writ of certiorari was filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

18 U.S.C. § 1956 provides:

Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity —

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part —

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 982 provides in relevant part:

Criminal forfeiture

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316, or 5324 of title 31, or of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

. . . . .

(b)(1) The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).

18 U.S.C. § 3572 provides in relevant part:

> Imposition of a sentence of fine and related matters
>
> (g) Security for stayed fine. — If a sentence imposing a fine is stayed, the court shall, absent exceptional circumstances (as determined by the court) —
>
> (1) require the defendant to deposit, in the registry of the district court, any amount of the fine that is due;
>
> (2) require the defendant to provide a bond or other security to ensure payment of the fine; or
>
> (3) restrain the defendant from transferring or dissipating assets.

Rule 32 of the Federal Rules of Criminal Procedure provides in pertinent part:

> Sentence and Judgment
>
> (d) Judgment.
>
> . . . . .
>
> (2) Criminal Forfeiture. If a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after

providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.

Rule 38 of the Federal Rules of Criminal Procedure provides in pertinent part:

Stay of Execution

. . . . .

(e) Criminal Forfeiture, Notice to Victims, and Restitution. A sanction imposed as part of the sentence pursuant to 18 U.S.C. 3554, 3555, or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering

of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

STATEMENT OF THE CASE

Beginning in the latter part of 1989 and stretching to February of 1992, Tennessee Bureau of Investigation (TBI) agents, participating in a joint investigation with the Federal Bureau of Investigation (FBI), conducted field investigations of criminal activity in the Eastern District of Tennessee. TBI personnel worked as undercover agents to obtain evidence of illegal gambling by sending agents to locations where video slot machines were present for the purpose of playing the machines. Once an agent was paid off on a machine and received his "winnings," he made reports of locations where he received money. As a result of the evidence obtained, the TBI and FBI seized several video poker machines from locations across the Eastern District of Tennessee.

Some machines seized in this investigation belonged to Petitioner David Tex Hill (hereafter "Petitioner Hill" or "Mr. Hill"). As a prominent area businessman, Mr. Hill at one time owned fourteen pieces of property and close to twenty-five businesses, including: Harrison Hill Oldsmobile, H & D Auto Parts, H & H Auto Sales, farm lands, a dairy farm, tractor and farm equipment sales, rental properties, a coin operated laundromat and two amusement and video machines businesses, Playtime Amusement and Play and Play Amusements.

Between 1987 to 1992, Mr. Hill owned an amusement company called "Play Time" and another called "Play and Play," which owned, leased and maintained video games and pool tables for bars, restaurants and convenience stores. It is not disputed that Mr. Hill placed these electronic video games at area establishments and serviced them in return for a 50/50 split of the money spent on the games. Included with the games provided to area businesses were video poker games. Testimony by Mr. Hill's employees indicates that the video poker games comprised only 25% of the total number of the amusement businesses. Mr. Hill also supplied and serviced pool tables, juke boxes, amusement video games, such as Pac-man, pinball machines and crane games.

Prior to the seizure of the machines, Mr. Hill had relied upon several actions by the government and the courts that reasonably led him to believe he was in fact not violating the law. However, on August 18, 1992, the Federal Grand Jury for the Eastern District of Tennessee at Knoxville returned a seventy-one (71) count indictment charging Mr. Hill and eighteen (18) co-defendants with conspiracy to operate an illegal gambling operation. On March 17, 1993, the Federal Grand Jury returned another indictment naming Mr. Hill and three others with additional money laundering violations related to the first indictment.[1] The first indictment charged that Mr. Hill, along with local owners of restaurants, bars and convenience stores, conspired to conduct an illegal gambling business and did conduct an illegal gambling business in violation of Title 18 U.S.C. § 1955, by placing illegal gambling devices in locations and dividing among themselves the proceeds from these devices.

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1. The two indictments were consolidated on the government's motion by Order dated April 26, 1993.

The first indictment also charged that Mr. Hill knowingly conducted financial transactions (involving the proceeds of the illegal gambling business) with the intent to promote the illegal gambling business (18 U.S.C. § 1956 (a)(1)(A) and 2, Counts 3-31), and knowingly conducted financial transactions (involving proceeds of the illegal gambling business) designed to conceal the nature of the proceeds (18 U.S.C. § 1956 (a)(1)(B) and 2, Counts 32-53).[2] The government sought forfeiture of all property belonging to Mr. Hill that was directly or indirectly involved in the commission of the alleged felonies (18 U.S.C. § 982 and 21 U.S.C. § 853, Count 71).

The second indictment, returned on March 13, 1993, charged Mr. Hill and three others with thirty-four (34) counts of money laundering. This indictment alleged that Mr. Hill knowingly conducted a financial transaction (with unlawful proceeds), with a value greater than $10,000 in violation of 18 U.S.C. § 1957 and 2 (Count 1), and multiple counts of knowingly conducting financial transactions to avoid transaction reporting requirements under federal law. (18 U.S.C. § 1956(a)(1)(B)(ii), Counts 3-5). The government also sought forfeiture of all real property involved directly or indirectly (18 U.S.C. § 982 and 21 U.S.C. § 853, Count 34).

Prior to trial, various counts of the indictments were dismissed. On June 6, 1996, upon motion of the United States, Counts 21, 32, 33, 34, 35, 41, 50, 64 and 65 were dismissed, pursuant to Rule 48 of the Federal Rules of Criminal Procedure. On September 30, 1996, Counts 4, 56

2. Counts 54-70, later dismissed, charged financial transactions designed to avoid reporting requirements in violation of 18 U.S.C. § 1957 and 2.

and 57 of the indictment were dismissed. In addition, at the close of the government's proof, the structuring Counts 54-70 of the first indictment were dismissed and Count 1 of the second indictment was dismissed, pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Thereafter, the United States renumbered the indictments containing the counts that remained after dismissal of the above charges.

Mr. Hill proceeded to trial in both cases on October 2, 1996 before the Honorable James H. Jarvis, United States District Judge and a jury. On October 21, 1996, the jury returned a verdict of guilty on Counts 1-5, 25, 26, 29, 30, 31, 35, 38, 43-45 of the first renumbered indictment and Counts 1-3 of the second renumbered indictment and a verdict of not guilty as to the remaining counts of the indictment pertaining to him. On October 22, 1996, the jury returned a verdict of forfeiture against Mr. Hill, finding that all properties set out in items 1-14 of the criminal forfeiture special verdict form were involved in the offenses.

On June 20, 1997, Judge Jarvis assessed a fine of $25,000 and sentenced Mr. Hill to 57 months on counts, 1-5, 25, 26, 29, 30, 31, 35, 38, 43, 45, all to run concurrently. Mr. Hill filed a timely notice of appeal to the Court of Appeals on August 6, 1997, challenging his conviction and the sentence imposed by the district court. The Court of Appeals affirmed Petitioner Hill's conviction and reversed the district court's decision to substitute assets and stay the execution of the forfeiture order pending appeal.

REASON FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT COURT OF APPEALS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION IN A MANNER THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Petitioner submits that the Court of Appeals' decision is contrary to the letter and spirit of *Crane v. Kentucky*, 476 U.S. 683, 90 L. Ed. 2d 636, 106 S. Ct. 2142 (1986); and *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

A. A Criminal Defendant Has A Fundamental Constitutional Right To Present A Complete Defense.

Petitioner Hill submits that the district court erred in ruling, *in limine*, to refuse to allow him to present a defense. The district court excluded all defense proof on the essential knowledge-of-a-felony element. Petitioner Hill offered witness' testimony as to whether they believed the video poker machines were unlawful or constituted a felony, judicial opinions declaring the machines not illegal, and the testimony of TBI Director John Carney before the Tennessee General Assembly. The district court ruled, *in limine*, to exclude this evidence and further held that if Petitioner Hill testified, he would not be permitted to explain that these matters formed the basis for his belief that his conduct was a lawful business transaction and did not constitute a felony.

The Supreme Court of the United States has unanimously stated that a defendant has "a fundamental constitutional right to a fair opportunity to present a defense." *Crane v. Kentucky*, 476 U.S. 683, 687, 90 L. Ed. 2d 636, 643, 106 S. Ct. 2142 (1986). In *Crane*, the Court cited *California v. Trombetta*, which states: "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413, 419 (1984).

Further, it has been recognized that courts cannot take away this right to present a defense with a broad ruling in limine precluding an entire defense. "Motions in limine were intended to promote fair trials for the accused in a criminal case." Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 Stanford L. Rev. 1271, 1327 (1987). Although the motion in limine is not expressly authorized in any rules of federal procedure, its use has spread and today it is accepted in almost every jurisdiction. *Id.* at 1276. As its use has spread, however, "judges and commentators have united around one important admonition: The in limine procedure must be limited to specific, individual items of prejudicial evidence, and must not be so overly broad as to restrict an opposing party's presentation of its case." *Id.* at 1277 (citations omitted).

Professor Colbert argues that the use of the motion in limine to prevent an entire defense is "an alarming trend" and quotes the Iowa Supreme Court in support of a narrow use of the motion: "The motion should be used, if used at

all, as a rifle and not as a shotgun, pointing out the objectionable material and showing why the material is inadmissible and prejudicial." *Id.* at 1272 and 1277 (quoting *Lewis v. Buena Vista Mutual Insurance Assoc.*, 183 N.W. 2d. 198, 201 (Iowa 1971); *See also State v. Quick*, 597 P.2d 1108, 1112 (Kan. 1979) (must not be used to choke off valid defense in criminal action).

Because Petitioner Hill was charged with several money laundering offenses in violation of 18 U.S.C. § 1956 and because money laundering is a specific intent crime, Petitioner Hill should have been afforded the opportunity to combat the requisite mental element of the offense. The evidence excluded by the district court was evidence directly relating to Petitioner Hill's mental state. It was error for the district court to exclude evidence as to an essential element of the crime.[3] Pursuant to the longstanding principles of fundamental fairness embraced by the Due Process Clause of the Fifth Amendment, evidence relating to Petitioner Hill's mental state should have been admitted into evidence.

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3. This is particularly true given the Sixth Circuit Court of Appeals' recent holding in *United States v. Dixon*, No. 97-6088 (6th Cir. Jan. 27, 1999). The *Dixon* Court held that "the knowledge requirement of 18 U.S.C. § 1956 makes it a specific intent crime, subject to a defense that a defendant lacked the requisite knowledge." *United States v. Dixon*, No. 97-6088, slip op. at 7-8 (6th Cir. Jan. 27, 1999). The *Dixon* Court went on to hold that evidence of the defendant's state of mind was relevant in a prosecution for money laundering and should have been admitted as a good faith defense. *United States v. Dixon*, No. 97-6088, slip op. at 8 (6th Cir. Jan. 27, 1999).

B. The District Court Did Not Err When It Issued A Preliminary Forfeiture Order That Allowed The Defendant To Pay $500,000 In Lieu Of The Forfeiture Of Close To $1,000,000 Worth Of Real And Personal Properties.

When the district court entered the preliminary order of forfeiture, it fashioned an appropriate remedy compatible with the yet unresolved nature of the forfeiture sanction. The district court recognized that the provisions of 18 U.S.C. § 982 and 21 U.S.C. § 853 mandate forfeiture of properties "involved in" the convicted offenses. However, because the district court was responding to the forfeiture issue preliminarily, it fashioned a solution within its discretion. The district court ordered forfeiture of all subject property, but then offered Petitioner Hill an alternative to pay $500,000 in cash, into the registry of the court within 30 days, in lieu of forfeiture of all subject properties.

The basis for this option was the district court's recognition that "it will take substantial time, effort and expense to convert the properties to be forfeited into cash money." In its Order, the district court recognized the valuation and administrative difficulties involved in this type of final disposition and offered a more expeditious alternative.

Petitioner Hill does not dispute that criminal forfeiture pursuant to 18 U.S.C. § 982(a)(1) and 21 U.S.C. § 853, made applicable by 18 U.S.C. § 982 (b)(1) would be required if the money laundering convictions withstand challenge on appeal. It is clear and settled that forfeiture under these statutes would be mandatory. *See United States v. Tencer*, 107 F.3d 1120, 1134 (5th Cir. 1997). Petitioner

Hill also agrees that a final order of forfeiture would be mandatory in nature. However, because the disputed order was preliminary in nature, the district court properly exercised its discretion.

Clearly this order was preliminary only. This was illustrated by the fact Petitioner Hill suggested a final order of forfeiture in the district court. In fact, Petitioner Hill argued to the district court that it was improper to grant the challenged preliminary order of forfeiture and that at sentencing a final order of forfeiture should have been entered pursuant to Fed. R. Crim. P. 32(d)(2). In response, the district court made it clear this order was preliminary in nature when it offered Petitioner Hill an alternative to the harsh forfeiture proposed and refused to enter a final order.

Further, the purpose of this preliminary order of forfeiture was not to settle the issues of forfeiture altogether, but rather to establish a plan for the way the forfeiture ought to be handled in the final order. The district court offered an expeditious alternative to Petitioner Hill and one that the government initially did not dispute. The practical effect of this preliminary order of forfeiture is that it guarantees that the government will receive at least $500,000 as a result of the final forfeiture. This is similar to 18 U.S.C. § 3572(g)(2), a statutory provision that permits a district court to approve security for a stayed fine. By analogy, the district court with this preliminary order of forfeiture has approved security worth $500,000 for the government.

C. The District Court Did Not Abuse Its Discretion When It Stayed The Execution Of The Criminal Forfeiture Judgment, As It Is Well Within The District Court's Discretion To Consider Prejudice To The Defendant And The Difficulties Of Execution Of Forfeiture While An Appeal Is Pending.

The government argued to the Court of Appeals that the district court abused its discretion by staying the execution of the criminal forfeiture judgment pursuant to Fed. R. Crim. P. 38(e). Petitioner Hill originally requested that the district court stay the execution of the fine and forfeiture orders pending appeal. The government argued that by granting the stay of execution of forfeiture, the district court's order precluded ancillary proceedings which would expeditiously validate third party claims and clear its titles. According to the government, this result, that ancillary proceedings on the subdivision lots may not begin pending appeal of the stay order, compels the conclusion that the district court abused its discretion.

Rule 38(e) provides: "a sanction imposed may, if an appeal of the conviction or sentence is taken, be stayed by the district court upon such terms as the court finds appropriate." Fed. R. Crim. P. 38(e). Clearly the imposition of the stay by the district court must be measured against this standard.

The district court's order and motions by both parties indicate that the court stayed the execution of forfeiture based upon concerns of prejudice to Petitioner Hill should the assets be forfeited and sold, then Petitioner Hill prevailed on appeal. In its Memorandum Opinion and Order, the district court addressed the possible valuation problems

associated with sale of the unique assets sought to be forfeited, such as the stock and the Florida property by granting a stay of execution. Although the government only challenges this stay of execution of forfeiture with regard to the subdivision lots, involved in Counts 31 and 35, the district court considered these properties, along with cash, stocks and the Florida beachfront home, as part of a larger issue when it decided to stay the execution of the forfeiture judgment. The rationale that the district court used to stay the entire forfeiture order amount applies equally to the subdivision properties alone.

The district court had very important reasons for ordering the stay of forfeiture pending appeal of the preliminary forfeiture order. Once the forfeiture is executed and assets are sold, there is prejudice to Petitioner Hill should he prevail on appeal. His assets having been sold, the only thing he would receive back would be monetary compensation. In Petitioner Hill's case such a result would be problematic for several reasons. The forfeiture order here involved a beachfront property in Florida, a convenience store, cash, stocks and the subdivision properties, a varied grouping of assets which must be converted into cash. Secondly, the government could, at best, only estimate the values of these assets ($750,000 estimate) as the stock can fluctuate and property values can increase or decrease.

Clearly, if the forfeiture of these assets was allowed while an appeal is pending, and Petitioner Hill prevails on appeal, the government would reimburse him in an amount equal to the fair market value. The government claims that this scenario offers no prejudice. Clearly this is untrue. Petitioner Hill would have lost possible profits, lost time value of money and would have to repurchase other stocks

and other properties. In a specific instance, such as the stock certificates, which have the potential to fluctuate, Petitioner Hill could stand to lose a substantial sum.

When compared to the imposition of a fine, the bias and possible prejudice to a defendant involved in defending a more complex criminal forfeiture sanction is clear. For example, a fine is easily collected by paying cash into a court fund and if a defendant prevails on appeal, the fine is easily repaid. Such a defendant is in substantially the same position as before, with the same amount of money. However, the complexity of forfeiture and sale of properties and stocks argues persuasively for a stay of forfeiture judgment pending appeal as the court must use its discretion to consider whether the repurchase of items and the compensation by the government of the fair market value of the items forfeited and sold, is prejudicial to the defendant. Surely this consideration is well within the discretion of the district court and is likely a common consideration and motivation for a stay of execution of the forfeiture judgments.

Finally, while the court may consider the rights of third parties in determining in its discretion whether or not to grant the stay, it clearly did not feel that this concern merited denying the stay. In light of overriding concerns of prejudice to Petitioner Hill, the district court acted appropriately within its discretionary powers and the Court of Appeals should be reversed.

CONCLUSION

For reasons stated herein, the Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND DECIDED FEBRUARY 17, 1999

UNITED STATES of America,
Plaintiff-Appellee,
Plaintiff-Appellant (97-6308/6309),
v.
David Tex HILL, Defendant-Appellant
(97-6051/6286),
Defendant-Appellee.

Nos. 97-6051, 97-6286, 97-6308, 97-6309.

United States Court of Appeals,
Sixth Circuit.

Argued Nov. 3, 1998.

Decided Feb. 17, 1999.

* * *

Before: MERRITT and COLE, Circuit Judges; EDMUNDS*, District Judge.

OPINION

EDMUNDS, District Judge.

David Tex Hill was convicted by a jury on charges of conspiracy and conducting an illegal gambling operation

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* The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

in violation of 18 U.S.C. § 1955 and on charges of money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(A) and (B). The jury also returned a special criminal forfeiture verdict finding that certain of Hill's properties were involved in the money laundering convictions. On appeal, Hill asserts multiple challenges to his convictions, sentence, and criminal forfeiture. The government has also filed an appeal challenging the district court's decisions (1) allowing Hill to substitute $500,000 cash in lieu of forfeiting the actual property the jury determined was involved in his money laundering convictions; and (2) staying the execution of that portion of the criminal forfeiture judgment as it relates to residential real property owned by bona fide purchasers for value pending this appeal.

As to Hill's money laundering convictions, we conclude that the district court did not err when it denied Hill's motion to dismiss the indictments. The Tennessee gambling statute is not unconstitutionally vague as applied in this case, and the indictments sufficiently alleged the knowledge element as required under § 1956(a)(1) of the money laundering statute. The statute does not require allegations or proof that the defendant knew the precise nature of the unlawful activity that produced the money he is accused of laundering; i.e., that he knew it came from felonious, as opposed to misdemeanor, activity. We similarly conclude that the district court did not err when it declined Hill's request to instruct the jury that a money laundering conviction under § 1956(a)(1) requires the government to prove that the defendant not only knew that the proceeds being laundered were derived from criminal activity but must also prove that the defendant knew the precise nature

of the criminal activity creating the laundered proceeds. The jury was properly instructed that the government must prove that the defendant knew the laundered funds came from criminal activity and must also prove that the criminal activity at issue was a felony under state or federal law.

Likewise, we conclude that the district court did not abuse its discretion or preclude Hill from presenting a defense as to the knowledge requirement of § 1956(a)(1) when it held inadmissible Hill's proffered evidence construing Tennessee's gambling statute and opining that mere possession or placement of gambling machines without more did not constitute a violation of Tennessee's gambling statute. Finally, as to these convictions, we conclude that the district court was not required to dismiss the § 1956 money laundering charges despite its dismissal of § 1957 charges and a structuring charge brought pursuant to 31 U.S.C. § 5324(a) because the latter are not lesser included offenses of the § 1956 money laundering offenses.

As to Hill's sentence, we conclude that this Court lacks jurisdiction to consider Hill's appeal of the district court's discretionary refusal to depart downward, and further conclude that the district court did not err when it found Hill was not entitled to a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a). As to Hill's forfeiture challenges, we conclude there was sufficient evidence connecting Hill's purchase of 616 shares of Greene County Bancshares stock to money gained from his illegal gambling business and reject as meritless Hill's claim that a draw on a line of credit, which is basically a loan, cannot constitute a money laundering transaction under 18 U.S.C.

§ 1956. We further conclude that Hill's criminal forfeiture is not disproportionate to his crimes, and thus does not violate the Excessive Fines Clause of the Eighth Amendment. Therefore, we AFFIRM Hill's convictions, sentence and criminal forfeiture.

As to the government's appeal, we REVERSE the district court's post-verdict forfeiture decisions because (1) the district court lacked authority, under 18 U.S.C. § 982, to allow Hill to substitute $500,000 cash in lieu of the property subject to forfeiture; and (2) the district court abused its discretion when it stayed, pending this appeal, the execution of that portion of the criminal forfeiture judgment relating to residential real property owned by bona fide purchasers for value.

I.

Defendant David "Tex" Hill owed businesses known as Play and Play Amusement and Playtime Amusements between 1987 and 1992. Through these businesses, Hill supplied Tennessee area businesses, such as restaurants, bars, and convenience stores, with video poker and video slot machines along with juke boxes, pinball machines, and pool tables. At issue here are the video poker and slot machines which accepted coins and dollar bills; some up to $20. After playing and winning at one of these machines, the business proprietor would pay the customer his cash winnings. Hill did not allow the video poker and slot machines to be placed in businesses that did not make payoffs. He and the business proprietors split the cash proceeds from these machines on a 50/50 basis.

Appendix A

Most of the proprietors using Hill's machines settled their accounts with Hill in cash and did not keep records of the proceeds. Hill's employees regularly emptied the cash from the machines and then settled up with the business owners; paying them in cash. Hill's employees were also paid in cash. Although Hill did not want records kept on the income generated by his gambling machines, two proprietors, Pete Campbell and Alice Sauls, did use checks to pay him. Each emptied Hill's machines, figured out Hill's 50 percent share, and wrote Hill a check for that amount. Alice Sauls also kept a ledger for 13 months between 1991 and 1992 of the breakdown of cash generated by the video poker and slot machines and the jukebox and pinballs machines located at her business. During the time Ms. Sauls kept the ledger, 84% of the cash came from the gambling machines and 16% came from the jukebox and pinball machines.

These checks and the Sauls ledger provided much of the government's proof that Hill's illegal gambling business generated cash income to Hill of approximately $1 million a year. The cash and checks paid to Hill for his 50% of the take from the machines were also traced to a checking account and a bank line of credit maintained on his behalf. Hill's proceeds from the machines were further traced to financial transactions intended to promote his gambling business, to financial transactions designed to conceal the nature of the proceeds or designed to avoid reporting requirements under federal law, and to the forfeited property. Also, as proof that Hill knowingly and willfully conducted an illegal gambling business, the government presented evidence that when some of Hill's machines were

seized from a Monroe County, Tennessee restaurant by the Federal Bureau of Investigation (FBI) pursuant to a seizure warrant executed in October 1989, Hill replaced the machines within a day of their seizure. That October 1989 seizure warrant was found in Hill's Play and Play business headquarters in Maryville, Tennessee, during the execution of a search warrant by the FBI on May 20, 1992.

In August of 1992, Hill and 18 other defendants were charged in a 71-count indictment with multiple counts of conspiring to operate and operating an illegal gambling business in violation of 18 U.S.C. § 1955, and multiple counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (money laundering with the intent to promote the illegal gambling business), § 1956(a)(1)(B)(i) (money laundering with the intent to conceal the nature of the proceeds of the illegal gambling business), and § 1957 (money laundering offenses involving monetary transactions of a value greater than $10,000 derived from the illegal gambling business). Hill was also charged with criminal forfeiture under 18 U.S.C. § 982 and 21 U.S.C. § 853 (demanding forfeiture of real and personal property directly or indirectly involved in the money laundering offenses).

In March of 1993, a federal grand jury returned a second indictment against Hill, his brother and two other defendants. Hill was charged with one count of money laundering involving a monetary transaction of value greater than $10,000 in violation of 18 U.S.C. § 1957. Hill was also charged with three counts of money laundering designed to avoid reporting requirements in violation of 18

U.S.C. § 1956(a)(1)(B)(ii); one count of "structuring" money transactions to avoid reporting requirements in violation of 31 U.S.C. §§ 5322 and 5324; and one count of criminal forfeiture under 18 U.S.C. § 982 and 21 U.S.C. § 853.

The two indictments were consolidated for trial. Extensive pretrial litigation ensued over the next three years, which included three interlocutory appeals to this Court. Ultimately, all charges against several codefendants were disposed of, leaving only the charges against Hill for trial.[1]

The trial was bifurcated to allow the forfeiture counts to be separately considered. Defendant Hill went to trial on October 1, 1996. Several counts of the first indictment were dismissed prior to trial upon motion by the government. At the close of the government's case, the district court granted Hill's motion for acquittal as to all counts charging a violation of 18 U.S.C. § 1957. The court also dismissed the only Title 31 structuring charge which was count 6 of the second indictment. The indictments were then renumbered, leaving a 46-count first indictment and a 4-count second indictment for the jury's consideration. The last count in each indictment was a criminal forfeiture count, and these were to be addressed in a separate trial.

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1. Six codefendants pled guilty to their involvement in the illegal gambling business. The charges against Hill's brother, Luther Hill, were dismissed prior to trial upon motion by the government. The remaining defendants, who were business proprietors who made use of Hill's video poker and video slot machines, entered into Pretrial Diversion Agreements.

Appendix A

On October 21, 1996, the jury returned guilty verdicts as to the counts of conspiracy and conducting an illegal gambling business in violation of § 1955, and also found Hill guilty of 16 counts of money laundering in violation of §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(a)(1)(B)(ii). Hill was found not guilty on the remaining counts. On June 20, 1997, the district court fined Hill $25,000 and sentenced him to 57 months' imprisonment on each count of conviction, all to run concurrently. For sentencing purposes, the district court made a factual finding that 75 percent of all the funds generated by Hill's amusement business were from the operation of illegal gambling devices.

At the separate October 22, 1996 trial on the criminal forfeiture counts, the jury returned a special verdict finding that each property that was the object of a money laundering count on which Hill was convicted was "involved in" the charged offense and subject to forfeiture. The government subsequently moved for a preliminary order of forfeiture with regard to the properties and funds subject to forfeiture.[2] On July 18, 1997, the district court issued a preliminary order of forfeiture. Rather than ordering immediate forfeiture as the government sought pursuant to 18 U.S.C.

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2. The government sought the actual forfeiture of the forfeited property, including sums of cash, a convenience store, a restaurant, 616 shares of Greene County Bancshares stock, and a Florida beachfront home. The government did not seek the actual forfeiture of subdivision lots which had been sold to bona fide purchasers for value. As to the forfeited lots, the government intended to satisfy the criminal forfeiture judgment with substitute assets of Hill's pursuant to 21 U.S.C. § 853(p).

§ 982(a)(1) and 21 U.S.C. § 853(a), the district court decided sua sponte that Hill could pay $500,000 in lieu of actual forfeiture of the subject properties. Judgment was entered on July 31, 1997. Timely appeals were filed by both parties. The court also issued an order, on August 21, 1997, permitting Hill to post letters of credit worth $400,000 and a $100,000 cash bond toward satisfaction of the $500,000 forfeiture, and stayed execution of the forfeitures pending appeal. The government filed a timely appeal of the stay order.

II.

A. Stay

As a threshold matter, this Court denies Hill's motion seeking a stay of this appeal pending the outcome of an appeal in an unrelated case in the Tennessee state courts. A stay is not warranted under the Pullman doctrine of abstention or principles of judicial economy and efficiency. See Railroad Comm'n of Texas v. Pullman, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

In an unpublished March 18, 1998 two-page order, a Tennessee Circuit Court for Montgomery County dismissed a one count indictment against the defendant finding the definition of "gambling" and "gambling device" in Tenn.Code Annot. §§ 39-17-501 and 505 unconstitutionally vague and overly broad under both the Tennessee and United States' Constitutions. See State of Tennessee v. Rhonda Burkhart, No. 38568. The state has appealed the ruling.

Hill's arguments for a stay are without merit. His motion and the orders he relies upon do not provide this Court with critical underlying facts, such as the defendant's alleged criminal conduct and whether Tennessee's gambling statute was found unconstitutional on its face or as applied to the specific facts of the Burkhart case. It is unlikely that the trial court found the statute unconstitutional on its face. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (where the Court observed that a facial vagueness challenge requires a showing that "the enactment is impermissibly vague in all its applications"); United States v. Loehr, 966 F.2d 201, 204 (6th Cir.), cert. denied, 506 U.S. 1020, 113 S.Ct. 655, 121 L.Ed.2d 582 (1992) (where this court observed that, absent a first amendment challenge, the court examines whether a statute is unconstitutionally vague as applied to the specific facts of the case before it). It is more likely that the Tennessee trial court found the Tennessee gambling statute unconstitutional as applied to the specific facts of the case before it. As discussed below, Tennessee's gambling statute is not unconstitutionally vague as applied to the facts in this case. Even if the current statute were to be declared unconstitutional in some applications, electronic video poker and slot machines such as those at issue in Hill's prosecution have long been recognized as gambling devices and their use declared illegal under Tennessee's prior gambling statute.[3] See T & W Enterprises, Inc. v. Casey,

3. Should the Tennessee Supreme Court subsequently declare that Tennessee's gambling statute is unconstitutional, either on its face or as applied to facts similar to those presented here, Hill is not without a remedy. This Court's decision is without prejudice and does not preclude Hill from seeking relief under 28 U.S.C. § 2255.

715 S.W.2d 356 (Tenn.App.1986); State ex rel. Shriver v. Fraternal Order of Eagles, 671 S.W.2d 859 (Tenn.Cr.App.1984).

The Court turns now to Hill's substantive arguments. First, we address Hill's challenges to his convictions. Next, we address his challenges to his sentence. Finally, we address both Hill's and the government's challenges regarding forfeiture.

B. Section 1955 Gambling Convictions

Hill appeals his convictions under 18 U.S.C. § 1955 for conspiring and conducting an illegal gambling business. Section 1955 looks, in this case, to Tennessee law for the definition of an "illegal gambling business."[4] Hill contends

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4. 18 U.S.C. § 1955 provides that:

> (a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.
>
> (b) As used in this section —
>
> > (1) "illegal gambling business" means a gambling business which —
> >
> > > (i) is a violation of the law of a State or political subdivision in which it is conducted;

(Cont'd)

that the definitions of "gambling device" and "gambling" under Tennessee's gambling statutes, Tenn.Code Annot. §§ 39-17-501, et seq., are unconstitutionally vague thus failing to give him fair notice that his activities were prohibited. The district court found Hill's arguments unavailing, and denied his motion to dismiss those counts of the indictment charging violations of § 1955. We agree with the district court.

We review de novo the legal question whether Tennessee's gambling statutes are unconstitutionally vague. See United States v. McConney, 728 F.2d 1195, 1201 (9th Cir.), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). A statute is not unconstitutionally vague if "ordinary people, exercising ordinary common sense, can

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(Cont'd)

> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.
>
> (2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

understand it and avoid conduct which is prohibited". United States v. Salisbury, 983 F.2d 1369, 1378 (6th Cir.1993). The underlying principle of the void-for-vagueness doctrine is that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." Warner v. Zent, 997 F.2d 116, 125 (6th Cir.1993), cert. denied, 510 U.S. 1073, 114 S.Ct. 883, 127 L.Ed.2d 78 (1994) (quoting United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954)). "The law must be specific enough to give reasonable and fair notice in order to warn people to avoid conduct with criminal consequences" and "must also establish minimal guidelines to govern enforcement." Salisbury, 983 F.2d at 1378.

In cases such as this, where first amendment interests are not threatened, the court examines whether the statute is unconstitutionally vague as applied to the specific facts of the case; not whether it is unconstitutional on its face. See Loehr, 966 F.2d at 204 (citing Maynard v. Cartwright, 486 U.S. 356, 361, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)). See also Village of Hoffman Estates, 455 U.S. at 494-95, 102 S.Ct. 1186 (where the Court observed that a facial vagueness challenge requires a showing that "the enactment is impermissibly vague in all its applications"). Thus, the question here is whether Hill had reasonable and fair notice that his conduct was prohibited by Tennessee's gambling laws.

There are both misdemeanor and felony gambling violations in Tennessee. A person "who knowingly engages in gambling" commits a misdemeanor. Tenn.Code Annot.

§ 39-17-502. Gambling promotion is also a misdemeanor. Tenn.Code Annot. § 39-17-503 provides that this offense is committed by a person "who knowingly induces or aids another to engage in gambling, and: (1) Intends to derive or derives an economic benefit other than personal winnings from the gambling; or (2) Participates in the gambling and has, other than by virtue of skill or luck, a lesser risk of losing or greater chance of winning than one (1) or more of the participants."

It is a felony under Tennessee law to engage in "aggravated gambling promotion." Tenn.Code Annot. § 39-17-504 provides that this offense is committed by someone "who knowingly invests in, finances, owns, controls, supervises, manages or participates in a gambling enterprise." This section further provides that " 'gambling enterprise' means two (2) or more persons regularly engaged in gambling promotion as defined in § 39-17-503." "Gambling" is defined as "risking anything of value for a profit whose return is to any degree contingent on chance, but does not include a lawful business transaction"; and "gambling device" is defined as "anything designed for use in gambling, intended for use in gambling, or used for gambling". Tenn.Code Annot. § 39-17-501.

Hill's arguments, that he did not have fair notice that the conduct which forms the basis of his § 1955 convictions was illegal under Tennessee's gambling laws, are without merit. Hill asserts that Tennessee's gambling laws are unconstitutionally vague because the definitions for "gambling" and "gambling device" fail to give an ordinary person adequate notice whether conduct, such as owning

playing cards, lottery tickets, or newspapers that publish winning lottery numbers, is prohibited. The issue before the Court, however, is not whether a laundry list of possibilities renders the Tennessee statutes unconstitutional on their face or as applied to others; the issue is whether the statutes are unconstitutional as applied to Hill. See Loehr, 966 F.2d at 204. Hill lacks standing to attack Tennessee's gambling statute as it might be applied to others. See Village of Hoffman, 455 U.S. at 495, 102 S.Ct. 1186 (where the Court observed that a person "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others" and instructed that "[a] court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law").

Accordingly, to succeed on his "void for vagueness" argument, Hill must persuade the Court that he did not have fair notice that his conduct, which included placing video poker and slot machines in businesses and collecting one half of the profits generated from their use, was prohibited under Tennessee's gambling statute. Hill does not advance any such argument, and even if advanced, it would prove unsuccessful. Video poker and slot machines have long been recognized as gambling devices under Tennessee law and their use in connection with gambling is prohibited. This was true under Tennessee's former gambling statutes. See T & W Enterprises, Inc. v. Casey; State ex rel. Shriver v. Fraternal Order of Eagles; United States v. Marchman, 399 F.Supp. 585 (E.D.Tenn.1975). It is also true under Tennessee's gambling statute which was enacted in 1989. See Sentencing Commission Comments, Tenn.Code Annot.

§ 39-17-501 (West 1998) (where it is observed that the statutory definitions "are intentionally broader than those found in the prior law"). We affirm the district court's decision as to Hill's void for vagueness arguments.

We turn now to Hill's money laundering convictions.

C. Money Laundering Offenses and the Scienter Requirement of Section 1956(a)(1)

Initially, Hill raises three challenges to his money laundering convictions, each focusing on the scienter requirement of Section 1956(a)(1). First, Hill argues that his indictments did not adequately allege the knowledge element required for money laundering offenses under 18 U.S.C. § 1956(a)(1). Even though the money laundering counts track the language of the statute and allege that Hill knew that the property involved in the financial transactions represented the proceeds of unlawful activity, Hill maintains that the indictments must allege that he knew that the unlawful activity was a felony as opposed to a misdemeanor. Next, Hill challenges the jury instructions. He contends that the district court should have instructed the jury that the government was required to prove that he knew that the source of the laundered proceeds was criminal activity and that he also knew that the criminal activity constituted a felony, as opposed to a misdemeanor, under federal or state law. Finally, Hill challenges the district court's pretrial ruling which he claims prevented him from presenting a defense on an essential element of Section 1956(a)(1); i.e., knowledge of a felony. We hold that Section 1956(a)(1) does not require the government to prove that the defendant

knew that the alleged unlawful activity was a felony under state, federal or foreign law, as opposed to a misdemeanor, so long as the defendant knew that the laundered proceeds were derived from unlawful activity.

1. Adequacy of the Indictments

Whether an indictment adequately charges an offense is a question of law subject to de novo review. See United States v. Superior Growers Supply, Inc., 982 F.2d 173, 177 (6th Cir.1992). "The Notice Clause of the Sixth Amendment, as protected by Fed.R.Crim.P. 7(c)[5], guarantees a criminal defendant the right to be informed of the charges brought against him." Id. at 176 (footnote in original). This Court has observed that "[a]n indictment will usually be sufficient if it states the offense using the words of the statute itself, as long as the statute fully and unambiguously states all the elements of the offense." Id.

The money laundering counts in Hill's indictments track the language of the money laundering statute.[6] Hill argues

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5. Fed.R.Crim.P. 7(c) states in pertinent part that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offenses charged."

6. An example of the language used in the indictments follows:

> On or about the dates set forth below, in the Eastern District of Tennessee, defendant David T. Hill did knowingly conduct and attempt to conduct financial

(Cont'd)

that more is required for an offense under § 1956(a)(1). He contends that, when subsections (a)(1) and (c)(1) are read together, they require the government to include an allegation in the indictment that the defendant knew the precise nature of the unlawful activity that produced the money he is accused of laundering; i.e., that he knew it came from felonious, as opposed to misdemeanor, activity. Stated otherwise, Hill argues that, under § 1956(a)(1), it is acceptable to know that the money being laundered is "dirty" (unlawful activity is its source) as long as the defendant does not know that it is "really dirty" (its source is felonious activity). Failure to allege this "knowledge-of-a-felony" element, Hill asserts, requires dismissal of the money laundering counts. We disagree. Hill's arguments misconstrue the plain language of the statute, improperly conflate and confuse separate elements of money laundering under § 1956(a)(1), and defeat the statute's purpose.

(Cont'd)

> transactions which involved the proceeds of a specified unlawful activity, that is, an illegal gambling business conducted in violation of Title 18, United States Code, Section 1955, with the intent to promote the carrying on of the specified unlawful activity, and that while conducting and attempting to conduct such financial transactions, defendant David T. Hill knew that the property involved in the financial transactions, that is, funds and monetary instruments in the approximate amounts set forth below represented the proceeds of unlawful activity.

August 18, 1992 indictment. J.A. at 212.

Appendix A

Section 1956(a)(1) provides, in pertinent part, that:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified activity —
>
> > (A)(i) With the intent to promote the carrying on of specified unlawful activity; or
> >
> > * * *
> >
> > (B) knowing that the transaction is designed in whole or in part —
> >
> > > (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
> > >
> > > (ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction,

> whichever is greater, or imprisonment for not more than twenty years, or both.

The statute further provides, in subsection (c)(1), that, as used in § 1956(a)(1), the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the defendant "knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7)." 18 U.S.C. § 1956(c)(1).

In United States v. Maher, 108 F.3d 1513 (2nd Cir.1997), the court construed § 1956(a)(1)'s language, rejected an argument similar to the one Hill raises here, and held that the defendant's "knowledge of the precise nature of the unlawful activity that produced the money he laundered" was not an element of § 1956(a)(1) money laundering offenses. Id. at 1525. We agree with the Maher court's analysis and conclusion and find it controlling here.

As the Maher court observed, "[t]he first paragraph of § 1956(a)(1) is plainly crafted to distinguish between the actual source of laundered money and the defendant's knowledge as to the source of that money." Id. at 1526. Reading §§ 1956(a)(1) and (c)(1) together does not make that distinction any less plain. The defendant need only know that the source of the laundered money was some form of criminal activity. The elements for money laundering

set out in Section 1956(a)(1) require government proof that the defendant (1) conducted or attempted to conduct a financial transaction; (2) which he then knew involved the proceeds of some form of unlawful activity; (3) the unlawful activity constituted a felony under state, federal, or foreign law as required in subsection (c)(1); and (4) the financial transaction did in fact involve the proceeds of specified unlawful activity as defined in subsection (c)(7).[7]

Hill's "knowledge of a felony" argument improperly conflates elements (2), (3), and (4) above and misconstrues the plain language of subsections (a)(1) and (c)(1). As the Maher court observed, section 1956(a)(1) "requires proof that the laundered property 'in fact' involved the proceeds of 'specified unlawful activity' . . . , but it does not require proof that the defendant knew what that unlawful activity was. As to the defendant's knowledge, the government need only prove" that the defendant knew that the laundered property represented the proceeds of "some form of unlawful activity." Maher, 108 F.3d at 1526.

The Maher court further observed that subsection (c)(1) clarifies that the " 'knowing . . . some form of unlawful activity' phrase" contained in subsection (a)(1) means "there must be proof that the defendant 'knew' that the property to be laundered came from 'some form, though not

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7. Subsections 1956(a)(1)(A)(i), (B)(i), and (B)(ii) include an additional scienter element which is not at issue in this appeal; i.e., that the defendant either intended to promote a crime (subsection (A)(i)) or knew that the transaction was designed to conceal the proceeds of a crime (subsection (B)(i)) or was designed to avoid a transaction reporting requirement (subsection (B)(ii)).

necessarily which form,' of criminal activity." Id. Accordingly, the government is not required to show the defendant knew "that the property involved in the transaction represents the proceeds of a specific type of unlawful activity." Id. Accord, United States v. Carr, 25 F.3d 1194, 1204 (3rd Cir.1994). Applying that same analysis here, we conclude that the government is not required to show that the defendant knew the precise nature of the unlawful activity; i.e., that he knew it was felonious as opposed to misdemeanor activity, as long as the government shows the defendant knew the money was from some form of unlawful activity and further shows that the unlawful activity at issue was in fact a felony under state, federal or foreign law.

"This interpretation is supported by the section's legislative history." Maher, 108 F.3d at 1526. A congressional report analyzing the money laundering statute explains that the knowledge element discussed in subsections 1956(a)(1) and (c)(1) does not require that the defendant know exactly what crime generated the funds being laundered and further explains that the statute was designed to eliminate any such defense. Id. (citing S.Rep. No. 99-443 at 11-12 (1986)). Senate Report No. 99-443 provides that section 1956(a)(1):

> requires that the property involved in a transaction must in fact be the proceeds of "specified unlawful activity," and that the participant to the transaction must intend to facilitate "specified unlawful activity" or know that the transaction is designed to conceal the

> proceeds of "specified unlawful activity." However, in order to fall within the section, the participant need not know that the property involved in the transaction represents the proceeds of "specified unlawful activity." He or she need only know that it represents the proceeds of some form of unlawful activity. This distinction is drawn in order to prevent a defendant from escaping conviction by merely alleging that he or she though the property involved represented the proceeds of a crime not covered in the term "specified unlawful activity." It was reported to the Committee that such a defense has been successfully raised in other countries whose statutes do not draw the distinction in this section and it is the Committee's intention to avoid that result.

Id.

The Report points to the definition in subsection (c)(1) of the phrase "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" as used in section (a)(1), and clarifies that the phrase means "that the defendant need not know exactly what crime generated the funds involved in a transaction, only that the funds are the proceeds of some kind of crime that is a felony under Federal or State law." S.Rep. No. 99-443 (1986) at 12. The Report further explains that this language was included so as to "eviscerate the defense that a defendant knew the funds came from a crime, but thought the crime involved was a crime not on the list

of 'specified' crimes in section (c)(7)." Id. It is logical to conclude that this language was likewise intended to eviscerate the "but I thought the crime was only a misdemeanor" defense Hill urges us to acknowledge here. Rather, we conclude that Sections 1956(a)(1) and (c)(1) require the government to prove that (1) the defendant knew the laundered funds came from criminal activity; and (2) that the criminal activity at issue was designated a felony under federal, state, or foreign law.

We agree with the Second Circuit's observations that section 1956 focuses on the crime of money laundering and the attempt to launder dirty money; not the underlying criminal activity that produced the dirty money. "Why and how that money got dirty is defined in other statutes. . . . . The crime is the same: money laundering; the particular underlying activity specified by Congress is a necessary, but ancillary concern. . . . The precise nature of the unlawful source, so long as it is one that is among those listed in the statute, is an inconsequential detail that the defendant need not have known." Maher, 108 F.3d at 1527 (internal quotes and citations omitted).

The Senate Report confirms that the statute's "knowing" scienter requirements are far broader than Hill asserts. The Report instructs that the knowledge requirements are "to be construed, like existing 'knowing' scienter requirements, to include instances of 'wilful blindness.' See United States v. Jewell, 532 F.2d 697 (9th Cir.), cert. denied, 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976)." S.Rep. No. 99-433 at 9. See also Maher, 108 F.3d at 1527 (where the court observed that Congress intended section 1956's reach to be broad).

Contrary to the position Hill advances here, the statute's knowledge requirements do not require the government to prove, or to allege in an indictment, that the defendant knew that the source of the laundered proceeds was from criminal activity and to further prove that he also knew that the criminal activity at issue was designated as a felony, as opposed to a misdemeanor, under state, federal or foreign law. These arguments find no support in the plain language of the statute, its legislative history, or in appellate court decisions considering similar arguments.

The decisions Hill relies upon do not require a contrary result. Unlike the indictment in United States v. Pupo, 841 F.2d 1235 (4th Cir.), cert. denied, 488 U.S. 842, 109 S.Ct. 113, 102 L.Ed.2d 87 (1988), Hill's indictments properly alleged § 1956(a)(1)'s knowledge, or scienter, element. Unlike the indictment in United States v. Hooker, 841 F.2d 1225 (4th Cir.1988), Hill's indictments properly alleged § 1956(a)(1)'s elements; they did not merely cite the statute.

Hill's reliance on United States v. Hayes, 800 F.Supp. 1575 (S.D.Ohio 1992), aff'd in part and vacated in part on other grounds, 995 F.2d 1066 (6th Cir.1993), is likewise misplaced. The Hayes court observed that "to constitute money laundering in violation of 18 U.S.C. § 1956(a)(1)(A), the money in question must be proceeds of a felonious activity." Unlike Hill's prosecution here, in Hayes, the underlying criminal activity (copyright infringement) was in fact a misdemeanor; not a felony as required under subsections (a)(1) and (c)(1). The Hayes decision does not address section 1956(a)(1)'s scienter requirements and thus fails to advance Hill's knowledge-of-a-felony argument. To

the extent it holds otherwise, this Court disagrees with the unpublished decision from the District Court for the Northern District of West Virginia, United States v. Dobkin, Cr. No. 91-00148-01/02 (March 17, 1993).

Accordingly, we affirm the district court's decision denying Hill's motion to dismiss the money laundering counts of his indictments for failing to properly allege the scienter element of the charged money laundering offenses. We similarly hold that the district court did not err when it instructed the jury as to the knowledge elements of money laundering under section 1956(a)(1).

2. Jury Instructions

Hill argues that the district court erred when it failed to instruct the jury that a money laundering conviction under section 1956(a)(1) requires the government to prove that the defendant not only knew that the proceeds being laundered were derived from criminal activity but must also prove that the defendant knew that the criminal activity creating those proceeds was a felony. We disagree. There is no knowledge-of-a-felony element under Section 1956(a)(1).

The district court properly instructed the jury as to the money laundering offenses. Our review of the district court's charge to the jury, when taken as a whole, reveals that it "fairly and adequately submit[ted] the issues and applicable law to the jury." United States v. Buckley, 934 F.2d 84, 87 (6th Cir.1991) (quoting United States v. Martin, 740 F.2d 1352, 1361 (6th Cir.1984)). The knowledge

element discussed in subsections (a)(1) and (c)(1) requires proof that the defendant knew that criminal activity was the source of the laundered proceeds. There is no additional scienter requirement of proof that the defendant knew the precise nature of the criminal activity producing the dirty money; i.e., that it was a felony, as opposed to a misdemeanor. Rather, subsection (c)(1) requires that the government prove that the unlawful activity, which defendant knew was the source of the laundered money, did in fact constitute a felony under state, federal or foreign law.

We turn now to Hill's argument that the trial court improperly prevented him from presenting a defense on the knowledge-of-a-felony element.

3. Evidentiary Issues

Hill argues that the district court precluded him from presenting a defense when it ruled inadmissible Hill's proffered evidence, opining as to whether mere possession and placement of the video poker and slot machines without more was a per se violation of Tennessee law. Hill sought to introduce evidence that (1) he had discussions with a lobbyist and an official from a lobbying organization concerning whether video poker and slot machines, such as those at issue here, were gambling devices per se under Tennessee law; (2) he was aware of the fact that two state circuit courts had issued opinions stating that the machines are not gambling devices per se; and (3) he was aware of the fact that a former director of the Tennessee Bureau of Investigation had testified before a state legislative

subcommittee and had opined that the machines were not gambling devices per se. Hill contends that this proffered evidence was proof that he did not know that his conduct constituted a felony under Tennessee law and thus precluded him from presenting a defense to section 1956(a)(1)'s scienter element. Hill's argument is without merit.

First, as explained above, section 1956(a)(1) does not have a knowledge-of-a-felony requirement. Second, the government's case and its evidence focused, not on mere possession and placement of the video slot and poker machines, but on the fact that Hill placed the machines in various places of business with the intent that they be used for gambling. Whether the machines were per se gambling devices was not an issue in Hill's case. Accordingly, the district court did not abuse its discretion when it found the proffered evidence irrelevant and thus inadmissible.[8]

Furthermore, it is within the sole province of the court "to determine the applicable law and to instruct the jury as to that law", which in this case includes Tennessee's gambling laws. See In re Air Crash Disaster, 86 F.3d 498, 523 (6th Cir.1996). Hill's proffered evidence concerning the scope of Tennessee's gambling laws involves a question of law, not fact, and thus would have improperly invaded a matter solely within the court's province. As the district court properly observed, when determining whether Hill

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8. The district court's decision to exclude evidence is reviewed under an abuse of discretion standard. General Electric Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); United States v. Hart, 70 F.3d 854, 858 (6th Cir.1995), cert. denied, 517 U.S. 1127, 116 S.Ct. 1368, 134 L.Ed.2d 534 (1996).

violated Tennessee's gambling statute, it "is irrelevant whether or not, [or] what somebody told the defendant concerning the legality or illegality of his operation, as long as he, he knowingly did what he did." October 16, 1996 Motion Hrg. Transcript, J.A. at 439. It is the court's task to instruct the jury on the law, and it is the jury's task to then consider evidence regarding Hill's conduct; i.e., placing video slot and poker machines in private businesses and sharing the profits they generated, and to determine whether Hill violated Tennessee law. We affirm the district court's evidentiary ruling.

D. Lesser Included Offenses of Section 1956 Money Laundering

Hill raises yet another challenge to his money laundering offenses. He contends that the "dismissal of the structuring counts 54-70" at the close of the government's case "should have resulted in a dismissal of the money laundering counts as well" because the structuring offenses are lesser included offenses of the money laundering counts. We disagree. Hill's argument confuses the charges, misconstrues the district court's decision dismissing the § 1957 charges and the sole structuring offense, and misapplies Ratzlaf v. United States, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) and United States v. Holmes, 44 F.3d 1150, 1154 (2d Cir.1995).

Hill is confused about the charges in Counts 54-70 which consist of money laundering charges; not structuring offenses. Counts 54-70 of the first indictment alleged that Hill violated 18 U.S.C. § 1957 by knowingly engaging in

monetary transactions, affecting interstate commerce, and involving criminally derived property of a value greater than $10,000. The district court dismissed the § 1957 charges after determining that the evidence did not support a finding that more than $10,000 in the individual transactions at issue originated from illegal gambling proceeds rather than some legitimate source of income.

The $10,000 threshold is not an element of proof for the § 1956(a)(1)(B) money laundering charges. In addition, money laundering offenses under §§ 1956(a)(1)(B) and 1957 have different scienter requirements; § 1957 does not require that the defendant know that the transaction was designed to conceal or disguise the nature, location, source, ownership or control of the subject proceeds or designed to avoid a transaction reporting requirement under state or federal law. See United States v. Allen, 129 F.3d 1159, 1164-65 (10th Cir.1997). The statutes each require proof of an element the other does not. Accordingly, § 1957 offenses are not lesser-included offenses of § 1956. See e.g., United States v. Allen, 129 F.3d at 1164-65; United States v. Caruso, 948 F.Supp. 382, 390 (D.N.J.1996). The district court did not err when it dismissed the § 1957 charges but allowed the § 1956 charges to go forward.

The sole structuring offense alleging a violation of 31 U.S.C. § 5324(a) was charged in count 6 of the second original indictment. The district court dismissed this structuring charge on the ground that the government had failed to prove that the defendant knew that structuring was a crime. J.A. at 440-441. See Ratzlaf v. United States, 510 U.S. 135, 138, 114 S.Ct 655, 126 L.Ed.2d 615 (1994)

(holding that "to give effect to the statutory 'wilfulness' specification, the Government had to prove [the defendant] knew the structuring he undertook was unlawful.") The structuring and money laundering statutes at issue here have different knowledge requirements.[9] The structuring statute, unlike § 1956(a)(1)(B)(ii), does not speak to the attempt to cleanse dirty money, but rather to designing a transaction, in whole or in part, so as to avoid a transaction reporting requirement under state or federal law. Moreover, § 1956(a)(1)(B)(ii), unlike the structuring statute, does not require that the defendant know that structuring or money laundering is a crime; and therefore the holding of the Court in Ratzlaf is inapplicable. See United States v. Santos, 20 F.3d 280, 283 n. 2 (7th Cir.1994). The structuring statute and § 1956(a)(1)(B)(ii) each require proof of an element the other does not. Accordingly, the district court did not

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9. "In order to prove structuring, the government ha[s] to show that (1) [the defendant] knew of the relevant reporting requirements, (2) he structured his transaction for the purpose of evading those reporting requirements, and (3) he acted with knowledge that [such] conduct was unlawful." United States v. Gabel, 85 F.3d 1217, 1223 (7th Cir.1996).

In order to prove money laundering under § 1956(a)(1)(B)(ii), the government must prove that "(1) the defendant willfully conducted or caused to be conducted a financial transaction; (2) the defendant knew at the time of the financial transaction that the money represented proceeds of some unlawful activity; (3) the money involved was in fact the proceeds of specified unlawful activity; and (4) the defendant knew at the time that the transaction was designed in whole or in part to avoid a transaction reporting requirement". United States v. Morales, 108 F.3d 1213, 1221 (10th Cir.1997).

err when it dismissed the structuring charge but allowed the § 1956(a)(1)(B)(ii) money laundering charges to go forward.[10]

Having affirmed Hill's convictions under 18 U.S.C. §§ 1955 and 1956, we turn now to his sentencing challenges. We first address his claim that the district court erred when it denied his request for a downward departure. We next address his claim that the court erred when it denied his request for a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1.

E. Sentencing

1. Downward Departure

At sentencing, Hill argued that he was entitled to a downward departure from the guideline range primarily because his conduct was outside the "heartland" of cases usually covered by the money laundering guidelines. The district court apparently disagreed because the requested downward departure was not granted. There is no evidence that the district court was unaware of its discretion to depart from the guideline range or that the guideline range was

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10. Hill's reliance on United States v. Holmes, 44 F.3d 1150 (2d Cir.1995) is misplaced. Holmes did not involve and does not address the 31 U.S.C. § 5324 structuring offense. Rather, it involved money laundering charges under both §§ 1956(a)(1)(B)(i) and (B)(ii) involving the same illegal act which the court held improperly multiplied the charges against the defendant. To correct the error, the case was remanded with instructions to vacate the conviction under (B)(ii) but not the conviction under (B)(i).

improperly computed. We recently observed that the district court is not obligated to state that he knows he has the discretion to depart downward but is declining to do so. "Rather, it should be assumed, that the court, in the exercise of its discretion, found downward departure unwarranted." United States v. Byrd, 53 F.3d 144, 145 (6th Cir.1995) (internal quotes and citations omitted). Under the facts presented here, "[t]his court has no jurisdiction to hear an appeal of a district court's discretionary refusal to depart downward". United States v. Dellinger, 986 F.2d 1042, 1044 (6th Cir.1993).

2. Acceptance of Responsibility Adjustment

Hill further challenges his sentence claiming that the district court erred when it denied him a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a). Hill argues that he is entitled to the reduction because he fully acknowledged that he owned the video poker and slot machines and further argues that he should not be penalized for proceeding to trial so as to challenge the constitutionality of Tennessee's gambling law.

The burden is on the defendant "to show by a preponderance of the evidence that [he] had accepted responsibility for the crime committed." United States v. Thomas, 74 F.3d 701, 716 (6th Cir.), cert. denied, __ U.S. __, 117 S.Ct. 74, 136 L.Ed.2d 33 (1996). Although the guidelines permit a defendant to receive credit under § 3E1.1(a) even if he goes to trial, the reduction is "not intended for a defendant who puts the government to its burden of proof at trial by denying the essential factual

elements of guilt, is convicted, and only then admits guilt and expresses remorse." Comment n. 2 to § 3E1.1. It is only in "rare" situations that a defendant may receive the adjustment after trial and a guilty verdict; e.g., "where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt". Id.

The district court disagreed with Hill's contention that he had accepted responsibility for the charged offenses and observed that the record was "replete with denials" relating to Hill's factual guilt. The court further observed that, even at sentencing, Hill refused to admit his guilt and did not appear remorseful. June 20, 1997 Sentencing Transcript, J.A. at 516. We are convinced that the district court did not err when it declined to give Hill a two-level reduction, pursuant to U.S.S.G. § 3E1.1(a); we thus affirm Hill's sentence.[11]

The record refutes Hill's argument that he accepted the factual basis of the charged offenses. Likewise, his argument that he was merely raising constitutional issues is not borne out by the record. The government presented evidence that Hill operated an illegal gambling business, knew that his video poker and slot machines were used for gambling, shared in the profits, and laundered the proceeds of his illegal gambling business. Hill, on the other hand, contended that he was a legitimate businessman, not someone who

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11. "The sentencing court's finding regarding acceptance of responsibility is entitled to great deference and is reversed only if found to be clearly erroneous." United States v. Thomas, 74 F.3d 701, 716 (6th Cir.), cert. denied, __ U.S. __, 117 S.Ct. 74, 136 L.Ed.2d 33 (1996).

shared in illegal gambling profits or who laundered dirty gambling money.

Having affirmed Hill's sentence, we now turn to his forfeiture challenges.

F. Hill's Forfeiture Challenges

Hill was charged with criminal forfeiture under 18 U.S.C. § 982 and 21 U.S.C. § 853, and after a separate October 22, 1996 trial, the jury returned a special verdict finding that each property that was the object of a money laundering count on which Hill was convicted was "involved in" the charged offense and subject to forfeiture. Hill raises two challenges regarding the criminal forfeiture of his property. We first address Hill's specific challenge as to the forfeiture of 616 shares of Greene County Bancshares stock. We then address Hill's broader challenge that the criminal forfeiture of his property in toto violates the Excessive Fines Clause of the Eighth Amendment.

1. Stock Share Purchase

Hill contends that his 616 shares of Greene County Bancshares stock were improperly forfeited. He claims there was insufficient evidence connecting his stock purchase to money gained from his illegal gambling business because the stock was purchased with "clean" funds from his line of credit. The core premise of Hill's argument is that drawing on a line of credit, which is basically a loan, cannot constitute a money laundering transaction and thus cannot support a criminal forfeiture, such as that of the stock at

issue here, under 18 U.S.C. § 982. Hill's argument lacks merit both factually and legally.

There is ample evidence connecting the funds Hill deposited into his American Fidelity Bank line of credit to his illegal gambling business as well as evidence connecting the funds deposited to his purchase of the 616 shares of Greene County Bancshares stock.[12] Hill obtained the line of credit in 1988. A computer printout of the history of the account revealed that Hill used it extensively between 1988 and 1992, that he made substantial, repeated cash payments to reduce its outstanding balance, and that sometimes the payments would, in addition to cash, include checks from the two business proprietors that paid Hill by check for his share of the profits generated by his gambling machines located on their premises.

Hill used his American Fidelity Bank line of credit like most people use a checking account. He regularly applied gambling proceeds as payments on the line of credit, and immediately thereafter purchased cashier's checks using money drawn from the line of credit. It is undisputed that, on June 27, 1991, Hill deposited $60,000 in cash to be applied to his American Fidelity line of credit, thus increasing the outstanding balance available to him for draws. Immediately after making the payment, Hill

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12. We will not reverse a conviction for insufficient evidence "if, after viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." United States v. Beddow, 957 F.2d 1330, 1334 (6th Cir.1992) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

purchased a $63,140 cashier's check which he then used to purchase the stock at issue here.

Hill's legal argument; i.e., that use of a line of credit, which is basically a loan, can never constitute a money laundering transaction, is likewise without merit. The plain meaning of "transaction" as defined in § 1956(c)(3) proves otherwise. Section 1956(c)(3) defines "transaction" to include "with respect to a financial transaction . . . a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, . . . or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected." (Emphasis added). This broad definition of "transaction" includes Hill's use of his line of credit to launder money gained from illegal activity.

2. Excessive Fines

Hill's final challenge is that the district court erred when it concluded that the forfeiture ordered in this case did not violate the Excessive Fines Clause of the Eighth Amendment. The district court found that Hill had profited greatly from his criminal activity deriving income of about $3.5 million over a five year period. Hill was fined $25,000 in addition to the criminal forfeiture of approximately $1 million worth of property, thus incurring a financial penalty of slightly over $1 million. Other than the argument rejected above as to the Bancshares stock, Hill does not raise specific challenges as to the nexus between the money laundering offenses and the forfeited property. Rather, he concentrates his argument on the claim that the forfeiture is so grossly disproportionate to his crime that it violates the Eighth

Amendment. We agree with the district court. There is no Eighth Amendment violation.

The money laundering statute provides for a fine "of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater. . . ." 18 U.S.C. § 1956. Here, a fine of $2 million would not be excessive under the money laundering statute. This Court has rejected arguments similar to Hill's and has held that there is no constitutional violation when the forfeiture does not exceed the maximum fine allowed by statute. See United States v. Elder, 90 F.3d 1110, 1132-33 (6th Cir.1996).

G. Government's Forfeiture Challenges

We turn now to the government's appeal concerning the criminal forfeiture of Hill's property. The government raises two challenges. The first questions the district court's authority, under 18 U.S.C. § 982, to permit Hill to substitute cash in lieu of the property subject to forfeiture. The second asserts that the district court abused its discretion when it stayed the execution of that portion of the criminal forfeiture judgment relating to residential real property owned by bona fide purchasers for value pending this appeal.

1. Substitution of Cash for Property Subject to Forfeiture

The criminal forfeiture judgment in this case is predicated upon 18 U.S.C. § 982(a)(1) and 21 U.S.C. § 853, as made applicable by 18 U.S.C. § 982(b)(1)(A). After returning a guilty verdict on money laundering charges, the

jury, in a bifurcated proceeding, also returned a special criminal forfeiture verdict, finding that certain of Hill's real and personal property was involved in the money laundering offenses. The government then moved for a preliminary order of forfeiture. In a July 7, 1997 post-verdict forfeiture order, the district court gave Hill the option of satisfying the forfeiture order by depositing $500,000 into the registry of the court within 30 days instead of forfeiting the property subject to forfeiture. The approximate value of the forfeited properties is $1 million. The court also entered an order on August 21, 1997 permitting Hill to post letters of credit totalling $400,000 and a $100,000 cash bond toward satisfaction of the $500,000 forfeiture, and stayed execution of the forfeiture pending this appeal. The government argues that forfeiture of Hill's property found by the jury to be involved in the money laundering offenses is mandatory pursuant to 18 U.S.C. § 982, and the district court was without authority to permit Hill to substitute $500,000 in cash in lieu of forfeiture of the actual property subject to forfeiture. We agree.[13] The statutes at issue here require forfeiture of the actual property subject to forfeiture unless the district court finds substitution is appropriate under 21 U.S.C. § 853(p). The district court made no such finding under § 853(p), and the reasons it provided in support of its substitution are not included under that subsection.

Forfeiture of properties involved in money laundering is mandatory pursuant to 18 U.S.C. § 982(a)(1) and 21

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13. The standard of review of a district court's interpretation of federal forfeiture law is de novo. See United States v. $46,588.00 in U.S. Currency and $20.00 in Canadian Currency, 103 F.3d 902 (9th Cir.1996).

U.S.C. § 853(a). Section 982(a)(1) provides, in relevant part, that "[t]he court, in imposing sentence on a person convicted of an offense in violation of . . . section 1956 . . . of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." (Emphasis added). Similarly, 21 U.S.C. § 853(a) provides that "[t]he court, in imposing sentence . . . , shall order, in addition to any other sentence imposed pursuant to this subchapter . . . , that the person forfeit to the United States all property described in this subsection." 21 U.S.C. § 853(p), the "substitute asset provision", is "incorporated into the money laundering forfeiture scheme via 18 U.S.C. § 982(b)(1)", United States v. Voigt, 89 F.3d 1050, 1084 (3rd Cir.1996), and provides that "substitute property" may be forfeited if, "as a result of any act or omission of the defendant", the property (1) cannot be located despite due diligence; (2) has been transferred, sold to, or deposited with a third party; (3) has been placed beyond the court's jurisdiction; "(4) has been substantially diminished in value; or (5) has been commingled with other property which cannot be divided without difficulty." 21 U.S.C. § 853(p) (West 1998).

The district court quoted the mandatory language of 18 U.S.C. § 982(a)(1) and 21 U.S.C. § 853(a), indicating that the government was entitled to forfeiture of those properties the jury found were involved in Hill's money laundering offenses. July 7, 1997 Mem. Op. at 1-2. J.A. at 260-61. Then, citing no authority, the court granted Hill the option of substituting cash for the property which the jury found to be forfeitable, "because it will take substantial time, effort and expense to convert certain of said property into cash

money. . . ." July 7, 1997 Order, J.A. at 265-66; July 7, 1997 Mem. Op. at 6, J.A. at 264. We are convinced that the district court erred in its application of controlling law in this regard. The district court ignored the mandatory language of 18 U.S.C. § 982 and permitted a substitution of cash for forfeited property absent findings that substitution was proper under 21 U.S.C. § 853(p). The district court's order permitting the substitution of $500,000 in cash in lieu of forfeited property is reversed.

We turn now to the government's challenge regarding the district court's stay of execution of the criminal forfeiture judgment. The government challenges only that portion of the stay that relates to residential real property currently owned by bona fide purchasers for value.

2. Stay of Execution As to Residential Real Property

At Hill's request, the district court stayed the execution of the forfeiture order pending appeal. The government objected to the stay and argues that it placed an unnecessary cloud on the title to the subject property and impeded proceedings to clear the title as provided under 21 U.S.C. § 853(n) and to seek substitute assets under § 853(p). The government contends that the district court abused its discretion in staying the execution of the forfeiture order only as to certain subdivision lots that were developed and sold by Hill to bona fide purchasers for value prior to entry of the criminal forfeiture order. We agree.

Rule 38(e) of the Federal Rules of Criminal Procedure provides that, if an appeal of a conviction or sentence is

taken, the district court may stay the execution of a criminal forfeiture judgment. The decision to stay is discretionary. We are convinced that he district court abused its discretion when it stayed the execution of the forfeiture order involving residential real property currently owned by homeowners who were bona fide purchasers for value. It is undisputed that the purchasers were innocent victims of Hill's criminal activity, that Hill had sold the property to them, and that he no longer had an interest in the property. The court's entry of a stay stalled proceedings under § 853(n) that could have cleared title to the subject property and thus placed an unnecessary burden on the bona fide purchasers of this forfeited real property. We, therefore, reverse the district court's stay decision as it relates to the subject real property.

III.

For the foregoing reasons, we AFFIRM Hill's convictions, sentence and criminal forfeiture. We REVERSE the district court's post-verdict forfeiture decision allowing Hill to substitute $500,000 in cash in lieu of the forfeited property, and we REVERSE the district court's decision staying the execution pending appeal of that portion of the criminal forfeiture judgment as it relates to residential real property owned by bona fide purchasers for value.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE DATED AND FILED JULY 31, 1997

United States District Court
Eastern District of Tennessee at Knoxville

Case Number: 3:92CR00132-001

UNITED STATES OF AMERICA

v.

DAVID T. HILL

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

HERBERT C. MONCIER/DAVID WIGLER
Defendant's Attorney

THE DEFENDANT:

* * *

☒ was found guilty on count(s) 1-5, 25, 26, 29, 30, 31, 35, 38, 43-45 *(newly numbered) after a plea of not guilty.

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* Several counts were dismissed pursuant to Rule 29 of the Federal Rules of Criminal Procedure at the close of the government's case in chief. The remaining counts were then renumbered consecutively.

Appendix B

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to Conduct a Gambling Business in violation of Title 18 U.S.C. Sections 371 and 1955	07/08/1992	1
18 U.S.C. § 1955	Conducting an Illegal Gambling Business in violation of Title 18 U.S.C. Sections 2 and 1955	07/08/1992	2
18 U.S.C. § 1956 (a)(1)(A)	Laundering of Monetary Instruments in Violation of Title 18 U.S.C. Sections 1956(a)(1)(A) and 2	04/27/1992	3-5, 25, 26, 29
18 U.S.C. § 1956 (a)(1)(B)	Laundering of Monetary Instruments in violation of Title 18 U.S.C. Section 1956(a)(1)(B) and 2	07/08/1992	30, 31, 35 38, 43-45

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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☒ The defendant has been found not guilty on count(s) 6-24, 27, 28, 32-34,36, 37, 39-42 *(newly numbered)

☒ Count(s) 21, 32, 33, 34,35,41,50,64,65 *(original) are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 408-74-8551	06/20/97 Date of Imposition of Judgment
Defendant's Date of Birth: 07/29/1945	
Defendant's USM No.: 13090-074	s/ James H. Jarvis Signature of Judicial Officer
Defendant's Residence Address: 6027 U.S. Highway 411 South Maryville, TN 37801	JAMES H. JARVIS CHIEF U.S. DISTRICT JUDGE Name & Title of Judicial Officer

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* Several counts were dismissed pursuant to Rule 29 of the Federal Rules of Criminal Procedure at the close of the government's case in chief. The remaining counts were then renumbered consecutively.

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Defendant's Mailing Address:
6027 U.S. Highway
411 South
Maryville, TN 37801

7/31/97
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 57 month(s).

As to each count to run concurrent to one another and to run concurrent with the sentence imposed in 3.93CR00039-001 Sentence to Imprisonment STAYED pending direct appeal to the U.S. Court of Appeals

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant serve his term of imprisonment in a minimum security facility and that he be placed in the Intensive Confinement Program (Boot Camp)

* * *

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

* * *

☒ as notified by the United States Marshal.

* * *

Appendix B

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of

supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision — Page 5

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

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7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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SPECIAL CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court in Local Rule 83.10.

At the commencement of the term of supervised release, you shall pay any fine that has not yet been paid, in accordance with the probation officer's instructions.

Title 18 U.S.C., Sections 3565(b) and 3583(g), requires mandatory revocation of probation or supervised release for possession of a controlled substance or a firearm, or for refusal to comply with drug testing.

Appendix B

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment
Totals:	$ 750.00

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately;

* * *

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

Payments shall be made to the U.S. District Court Clerk, U.S. District Court, 800 Market Street, Knoxville, Tennessee 37902

☒ The defendant shall pay the cost of prosecution.

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

Property referenced in this Court's Preliminary Order of Forfeiture (Document 948) filed July 18, 1997, which the description of property is adopted herein by reference as if copied verbatim. Alternatively, the defendant is ordered to deposit into the registry of this Court Five Hundred Thousand Dollars ($500,000.00) within thirty (30) days of this Court's Memorandum Opinion and Order filed on July 7, 1997 (Document Numbers 944 and 945) in lieu of actually forfeiting any of the properties described, and that upon said deposit all right, title and interest in said $500,000.00 shall be vested in the United States and shall be disbursed into the Asset Forfeiture Fund in accordance with law.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

Appendix B

STATEMENT OF REASONS

* * *

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

The Court finds the value of the funds laundered to be $212,658.84. The acquitted conduct and the role in the offense adjustment are deleted from the Presentence Report.

Guideline Range Determined by the Court:

Total Offense Level: 25

Criminal History Category: I

Imprisonment Range: 57 to 71 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 10,000.00 to $ 100,000.00

* * *

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

* * * *

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 15, 1999

Nos. 97-6051/6286

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID TEX HILL,

Defendant-Appellant.

ORDER

BEFORE: MERRITT and COLE, Circuit Judges; and EDMUNDS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

In his petition for rehearing, defendant contends that our opinion in this case creates a conflict with our opinion

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* The Honorable Nancy G. Edmunds, United States District Judge for the Eastern District of Michigan, sitting by designation.

in *United States v. Dixon*, No. 97-6088 (6th Cir. Jan. 27, 1999) (unpublished), regarding the admissibility of third-party opinions addressing a defendant's motive. The two cases are distinguishable.

First, Dixon's proffered testimony involved his reliance on the advice of current state officials while defendant Hill's proffered testimony involved his reliance on significantly less probative and reliable sources, including a lobbyist and a former director of the Tennessee Bureau of Investigation. In addition with regard to the intent element needed to prove the money laundering counts, Dixon claimed that he had no knowledge that the funds were the proceeds of *unlawful* activity whereas defendant Hill claimed that he was unaware that the funds involved in the money laundering counts were the result of *felonious* activity. Hill does not contend that he believed that gambling with the machines was legal. Instead, he claims he thought it was a misdemeanor not a felony. However, knowledge that the funds resulted from felonious activity is not an essential element of a money laundering charge; the government need only prove that it came from unlawful activity. Accordingly, Dixon's state of mind regarding the specific intent necessary to prove the charge was relevant and Hill's was not.

The panel has further reviewed the petition for rehearing and concludes that all other issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green/ln
Leonard Green, Clerk